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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-624

UNITED STATES OF AMERICA, PETITIONER

v.

PENNSYLVANIA INDUSTRIAL CHEMICAL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A, pp. 1a-27a) are reported at 461 F.2d 468. The memorandum opinion of the district court on respondent's motion for judgment of acquittal (Pet. App. C, pp. 29a-41a) is reported at 329 F. Supp. 1118.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 28a) was entered on May 30, 1972. A petition for rehearing was denied on August 21, 1972 (Pet. App. D, p. 42a). Pursuant to an order extending the time within which to file a petition for a writ of certiorari,

the petition was filed on October 20, 1972; it was granted on December 18, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government's alleged failure to institute a formal permit program under the Refuse Act of 1899 (33 U.S.C. 407), pertaining to industrial discharges into navigable waters of refuse not having an adverse effect on navigation, is, if proved, a bar to criminal prosecutions under that statute for such discharges.

2. Whether respondent's claim that it was affirmatively misled by the Corps of Engineers into believing that it could with impunity discharge into the Monongahela River refuse not tending adversely to affect navigation is an adequate defense to the present prosecution.

STATUTES INVOLVED

Section 13 of the Rivers and Harbors Act of 1899 (the "Refuse Act"), 30 Stat. 1152, 33 U.S.C. 407, provides in pertinent part:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited * * * from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any

navigable water from which the same shall float or be washed into such navigable water * * *: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.

Section 16 of the Rivers and Harbors Act of 1899, 30 Stat. 1153, 33 U.S.C. 411, provides in pertinent part:

> Every person and every corporation that shall violate * * * sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500 * * *.

STATEMENT

On April 6, 1971, the United States commenced this prosecution by the filing of a criminal information (App. 3–4), which alleged that respondent, Pennsylvania Industrial Chemical Corporation ("PICCO"), had, on four separate occasions in August 1970, discharged from its industrial plant certain refuse into the Monongahela River, in violation of 33 U.S.C. 407 and 411. Following a jury trial

in the United States District Court for the Western District of Pennsylvania, PICCO was convicted on all four counts; the maximum fine allowable by statute, $2,500.00, was imposed on each count. The court of appeals reversed and remanded the cause to the district court for further proceedings (Pet. App. A, pp. 1a–27a).

1. At trial, it was stipulated that PICCO was the owner of a manufacturing establishment on the bank of the Monongahela River, a navigable water of the United States, and that the concrete and iron pipes which deposited into that river the alleged refuse matter involved here were also owned by PICCO (Pet. App. C, p. 30a). The iron pipe served only PICCO's plant; the concrete pipe served the plant and several private residences nearby (*ibid.*).

On the basis of tested samples taken from the discharges at both pipes, the criminal information charged (App. 3–4) that the effluent being deposited therefrom into the river included "iron, aluminum, and compounds containing these chemicals [and others] * * *, and solids * * *." The trial exhibits (Gov't Exs. 7–12, App. 240–242) and testimony (App. 61–76, 86–111) revealed that each of the four discharges involved contained considerably more suspended, volatile, fixed and total solids and aluminum than were found midstream in the Monongahela River. In addition, when compared with the midstream waters (Gov't Exs. 8 and 10, App. 240 and 241), two of the discharges had a significantly larger amount of sulphate (see Gov't Exs. 9 and 12, App. 241 and 242), and one of these two (Gov't Exs. 12, App 242) contained far more chloride

(as did a third deposit, Gov't Ex. 10, App. 241), and phosphate.[1]

PICCO took the position at trial that these sampled effluents did not constitute "refuse matter" within the meaning of the Act. That term, it argued, applied only to deposits that would "impede navigation," and did not cover liquid solutions such as flowed through its pipes. It also urged that the discharge from its plant was, in any event, nothing more than "sewage," which was not reached by the statutory proscription (Pet. App. A, pp. 4a–5a).[2] These contentions were rejected by the district court. It held (1) that the statutory prohibition against the discharge of refuse into navigable rivers did not depend on a resulting hindrance to navigation (Pet. App. C, p. 31a), and (2) that, since "each of the effluents was 'industrial waste,'" it was "not 'sewage,'" excepted from the Act's coverage (*id.* at 32a). These rulings were affirmed by the court of appeals (Pet. App. A, pp. 4a–6a).[3]

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[1] Comparison of Gov't Exs. 7, 9, 11 and 12 (App. 240, 241 and 242) with Gov't Exs. 8 and 10 (App. 240 and 241) also shows that three of the four discharges were considerably more alkaline and the fourth discharge more acidic than the midstream waters.

[2] The Refuse Act excepts from its coverage "* * * refuse matter * * * flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States * * *" (33 U.S.C. 407).

[3] Both courts below also rejected PICCO's contention that the term "refuse" in the 1899 Act should be defined in light of the water quality standards established pursuant to Section 10 (c)(1) of the Water Pollution Control Act of 1948, as amended (33 U.S.C. 1160(c)(1)). "Such a course of action would be unjustified," the court of appeals held (Pet. App. A, p. 8a),

2. The Refuse Act provides that the Secretary of the Army "may permit the deposit of [otherwise prohibited] material * * * in navigable waters * * * provided application is made to him prior to depositing such material * * *" (33 U.S.C. 407). It is undisputed that PICCO made no effort prior to the commencement of this action to obtain such permission with respect to the contested discharges into the Monongahela River (Pet. App. C, p. 30a).[4] The company offered at trial to show, by reference to certain regulations and internal memoranda of the Corps of Engineers, that the federal government never had a formal program for issuing discharge permits under the Refuse Act before December 1970 (App. 166–172).[5] It further offered to show, on the basis of the Corps of Engineers' alleged enforcement policy under the Act and on the basis of a 1949 conversation between officials of the Corps of Engineers and PICCO purportedly concerning a possible permit application, that it had been affirmatively misled into not applying for a

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"[i]n view of * * * significant differences [between the two statutes] in approach, and the 'cardinal rule that repeals [of legislation] by implication are not favored' * * *."

[4] The district court disallowed PICCO's offer of proof that it had obtained a discharge permit from the Commonwealth of Pennsylvania upon demonstrating that its industrial waste satisfied state water quality standards (Pet. App. C, pp. 33a, 40a).

[5] In December 1970, the President announced the establishment of a formal Refuse Act permit program (Exec. Order 11574); regulations implementing that program became effective April 7, 1971 (38 C.F.R. 209.131). That program recently became part of a new permit program authorized by Section 402 of the Federal Water Pollution Control Act Amendments of 1972, Pub. Law No. 92-500, 86 Stat. 880 (October 18, 1972).

federal discharge permit under the statute (App. 166–172, 175–177). These offers of proof were disallowed by the district court on the ground that they were not relevant to the issue of guilt under the Act (Pet. App. C, p. 35a). PICCO was convicted on all counts.

3. The court of appeals reversed (Pet. App. A, pp. 1a–27a). It rejected the district court's construction of the the Refuse Act prohibition against discharges as operating regardless of the absence of formalized permit procedures. Such a general proscription on the depositing of any "foreign substance" into the navigable waters of this country would, in the court's view, have had a "drastic impact * * * on the nation's economy even in 1899" (Pet. App. A, p. 10a). Instead, it held, Congress intended to condition enforcement of the Act on the creation and operation of an administrative permit program. The court stated (*id.* at 15a):

> Congress contemplated a regulatory program pursuant to which persons in PICCO's position would be able to discharge industrial refuse at the discretion of the Secretary of the Army. It intended criminal penalties for those who failed to comply with this regulatory program. Congress did not, however, intend criminal penalties for people who failed to comply with a non-existent regulatory program.

Support for this position was apparently found in "Congress' subsequent enactments in the water quality field" (*id.* at 10a). The court stated (*ibid.*) that "[t]here would appear to be something fundamentally inconsistent between the program of developing and

enforcing water quality standards under the Water Quality Act [of 1965] and section [13] of the Rivers and Harbors Act [of 1899], if the effect of the latter is to prohibit all discharges of industrial waste into navigable waters." As it viewed the matter, "[w]hat makes the two statutes compatible is the permit program contemplated by Section 13" (*ibid.*).

As an alternative basis for reversal, a majority of the court held that the district court had erred in disallowing PICCO's offer of proof that it had been affirmatively misled by the Corps of Engineers into believing that it was not necessary to obtain a federal discharge permit. Establishment of that proposition, it held (Pet. App. A, pp. 24a–25a), would be a due process defense to the prosecution.*

Accordingly, the case was remanded to the district court to give PICCO an opportunity "to prove the non-existence of a permit program at the time of the alleged offenses," or "to prove that the Corps of Engineers affirmatively misled it into believing that a permit was not necessary in its situation" (Pet. App. A, p. 25).

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* On this point, one judge dissented. He observed that *United States* v. *Standard Oil Co.*, 384 U.S. 224, 230, and *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F.2d 621 (C.A. 3), had settled the question of the applicability of the Refuse Act to industrial discharges such as those involved here well before PICCO's alleged violations occurred. "While I agree," he stated (Pet. App. A, pp. 26a–27a), "that [due process] may require a court to recognize the defense suggested by [the majority] * * *, I do not believe that a citizen may reasonably rely on a statement in an administrative regulation when the judiciray branch of the government has clearly declared the contrary."

SUMMARY OF ARGUMENT

I

The Refuse Act of 1899 forbids discharging or depositing into the navigable waters of the United States "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state * * *" (33 U.S.C. 407). This Court and other federal courts have read the prohibition broadly in order to achieve its fundamental purpose to protect the rivers of this country against refuse that could impede or injure navigation or pollute the free-flowing waters.

In the present case, the court below, although finding that the discharge by PICCO of its industrial waste into the Monongahela River came within the general prohibition of the statute, declined to enforce the operative provision of the Act. Because, in its view, the establishment of a formal regulatory program was required by the statutory proviso giving the Secretary of the Army discretionary authority (upon receipt of a prior application) to permit certain discharges, it held that no crime could be committed in the absence of a permit program.

This novel construction of the proviso would effectively nullify the Act's broad prohibition of pollutant discharges. Neither the language of the statute nor its legislative history supports such a result. Indeed, the decision below stands the Act on its head. What Congress generally proscribed—*i.e.*, the discharge of industrial pollutants into navigable waters—becomes generally permissible. And the limited defense to a

prosecution for discharges which Congress said the Secretary in his discretion "may permit" has been expanded by the court of appeals into virtually an absolute defense in the absence of a formal regulatory permit program which Congress did not specifically contemplate or prescribe.

The fact that later enactments by Congress have called upon the States to establish water quality standards with respect to interstate waters provides no basis for eliminating the broad prohibition in the Refuse Act. The subsequent legislation in this area explicitly states that nothing therein is to be construed as affecting or impairing the 1899 ban on discharging refuse matter. In the more recent statutes Congress has, moreover, instructed the Secretary of the Army, in exercising his discretion under the earlier law, not to grant any permit for discharges that fail to satisfy the new water quality standards.

For more than 70 years the Refuse Act has been enforced by the federal courts notwithstanding the nonexistence of a formal regulatory permit program. During that period the Secretary of the Army has from time to time issued Refuse Act permits. Moreover, in recent years, administrative enforcement of the broad prohibition in the 1899 statute against discharging industrial waste into our Nation's waterways has demonstrated a special concern for control of water pollution. There is, accordingly, no warrant for eliminating the prohibition of pollution provided

by Congress in the Refuse Act merely because the Secretary, prior to December 1970, exercised his "permit" authority informally upon submission of a discharge application rather than operating under a formal regulatory program.

II

While PICCO claims that it was affirmatively misled by the Corps of Engineers into believing that no permit was necessary to discharge its industrial waste into the Monongahela River, we do not believe the company can avail itself of that defense. The regulations on which it relies to support its due process claim are outdated and do not reflect the Corps' understanding of the Refuse Act prohibition after 1968. The more recent regulations of the Corps of Engineers demonstrate its concern with matters of pollution and clearly indicate that environmental factors play an important role in processing applications for permission to use navigable waters. In view of the Corps' unmistakable resolve since 1968 to protect our Nation's waterways against the discharge of pollutants, and the clear pronouncements by this Court and other federal courts that the unauthorized depositing of industrial waste into the rivers and harbors of this country are prohibited by the Refuse Act, PICCO is in no position to justify its conduct on the ground that it was affirmatively misled to believe that its conduct here was not a crime.

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ARGUMENT

I

THE DEPOSITING OF INDUSTRIAL WASTE INTO NAVIGABLE WATERS WITHOUT FIRST APPLYING FOR, AND OBTAINING, A DISCHARGE PERMIT FROM THE SECRETARY OF THE ARMY IS A VIOLATION OF THE REFUSE ACT

The discharge of industrial waste into the navigable waters of this country is, regrettably, a practice which too many have engaged in for much too long. Only in recent years has there emerged a national awareness of the very real threat that industrial pollution poses to the survival of our rivers and harbors and to the health and welfare of those who come into contact with polluted waters. Perhaps because many of the ecological problems that are now the focus of intense concern evolved gradually, the enforcement of existing, and development of new, legislative measures to combat water pollution has heretofore been pressed with less diligence than might have been the case had the potential danger been fully appreciated earlier.

A major effort by the federal government to clean up the Nation's waterways began in earnest only a few years ago. At the time, the only statutory weapons available to the government for use against those largely responsible for creating the present conditions were the previously little-used Refuse Act of 1899 (Section 13 of the Rivers and Harbors Act, 33 U.S.C. 407) and the much-amended Federal Water Pollution Control Act of 1948 ("FWPCA").[7]

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[7] C. 758, 62 Stat. 1155, as amended, Act of July 17, 1952 c. 927, 66 Stat. 755; Federal Water Pollution Control Act Amend-

The latter statute, at least prior to its most recent amendments,[8] proved to be an "inadequate response to the increasing problems of water pollution."[9] One of the difficulties resulted from the fact that the water quality standards provided for in the 1965 amendments to the FWPCA relate only to the quality of "interstate" waters, leaving the matter of pollution control with respect to navigable waters within each State

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ments of 1956, c. 518, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, Pub. L. No. 87-88, 75 Stat. 204; Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903; Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246; Water Quality Improvement Act of 1970, Pub. L. No. 91-224. 84 Stat. 91, 33 U.S.C. (1970 ed.) 1151-1175.

In 1972, the FWPCA was amended for the seventh time. Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816. This new legislation provides both for national water quality standards (Secs. 306 and 307, 86 Stat 854 and 858) and for a federal permit program relating to the discharge of pollutants into navigable waters (Secs. 401 and 402, 86 Stat. 877 and 880); it is to be administered by the Environmental Protection Agency (Sec. 101, 86 Stat. 816). Moreover, Section 402(k), 86 Stat. 883, provides for a hiatus on new litigation under the Refuse Act of 1899 until December 31, 1974, or, if sooner, until final administrative action has been taken on permit applications submitted under the 1972 statute.

The 1972 Amendments do not, however, affect the present litigation. They explicitly provide that pending actions under the 1899 Act "shall [not] abate by reason of the taking effect of the amendment made by section 2 of this Act" (Sec. 4(a), 86 Stat. 896). Unless otherwise indicated, the discussion of the FWPCA in this brief will relate to the statute prior to its amendment in 1972.

[8] See note 1, *supra*.

[9] Barry, *The Evolution of the Enforcement Provisions of the Federal Water Pollution Control Act: A Study of the Difficulty in Developing Effective Legislation*, 68 Mich. L. Rev. 1103, 1104 (1970).

essentially to local authorities.[10] A more fundamental weakness of the FWPCA until the 1972 amendments was in its enforcement procedures and the inherent time delays.[11] As explained by one commentator: "The act provide[d] for a complicated series of hearings and conferences; there [was] a minimum delay of 6 months before a hearing board [could] issue an abatement order, and the order [could] not compel actual abatement until an additional 6 months [had] elapsed."[12] Only after this extended period could the Attorney General of the United States seek judicial enforcement of the abatement order. Even then, the Act until 1972 provided no criminal or civil penalty for the previous discharge of noxious effluents (except oil spills), and thus it "fail[ed]

[10] 1965 Act, Sec. 5(a), adding Sec. 10(c)(5) to the FWPCA, 33 U.S.C. (1964 ed., Supp. IV) 466g(c)(5). If the discharges and the persons affected are in the same State, the consent of the governor of that State is required before a federal action can be commenced. 33 U.S.C. (1964 ed., Supp. IV) 466(g)(2). See also 33 U.S.C. (1970 ed.) 1160(g)(2).

[11] The problems in this regard are largely remedied by the 1972 amendments which provide for the immediate institution of a civil action in the federal courts for any violation of the statute (Sec. 309(b), 86 Stat. 860), and for the issuance by the Administrator of the EPA (see n. 29, *infra*) of compliance orders to any violator if a State has failed within 30 days of notice of the violation to institute enforcement proceedings (Sec. 309(a), 86 Stat. 859). The 1972 amendments also provide that those who "willfully or negligently" violate the operative provisions of the statute may be criminally prosecuted (Sec. 309(c), 86 Stat. 860).

[12] Steffin, *The Refuse Act of 1899: New Tasks For An Old Law*, 22 Hastings L.J. 782, 785 (1971). An alternative procedure allowed the Attorney General to institute a civil suit under the FWPCA if a violator failed to comply with water quality standards within 180 days of notice of the violation. 33 U.S.C. (1964 ed., Supp. IV) 466g(c)(5); 33 U.S.C. (1970 ed.) 1160(c)(5).

to make most acts of pollution sufficiently costly to the polluter to affect his initial decision whether to engage in conduct which causes pollution." Barry, *supra*, 68 Mich. L. Rev. at 1121.

For these reasons, the government turned to the Refuse Act of 1899, 33 U.S.C. 407, as the only effective legislative bulwark for sustaining against industrial assault the underlying philosophy that this Court had earlier said sustains a broad reading of that statute: "'A river is more than an amenity, it is a treasure.'" *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491, quoting Mr. Justice Holmes in *New Jersey* v. *New York*, 283 U.S. 336, 342.

A. THE REFUSE ACT PROHIBITION

1. Section 13 of the Rivers and Harbors Act of 1899 declares, in simple absolutes that have been characterized as "almost an insult to the sophisticated wastes of modern technology,"[13] that "[i]t shall not be lawful" to deposit or discharge into the navigable waters of the United States "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state * * *." 33 U.S.C. 407. This provision is a codification and consolidation of earlier criminal statutes which were designed to prohibit the willful or negligent discharge into navigable waters of matter that would obstruct navigation or cause pollution. *United States* v. *Standard Oil Co.*, 384 U.S. 224, 226–230.

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[13] Rodgers, *Industrial Water Pollution and the Refuse Act: A Second Chance for Water Quality*, 119 U. Pa. L. Rev. 761, 766 (1971).

From the outset, the Refuse Act has been read by the federal courts, in accordance with its plain language, as imposing a flat ban on the dumping of foreign substances into the Nation's free-flowing rivers (see, *e.g.*, *Scow No. 36*, 144 Fed. 932 (C.A. 1)), and the statutory term "refuse matter" has consistently been accorded a broad construction. Thus, the courts of appeals quite early declined to limit the criminal sanction to discharges of "such refuse matter only as would impede or obstruct navigation." *LaMerced*, 84 F. 2d 444 (C.A. 9); *The President Coolidge*, 101 F. 2d 638 (C.A. 9); *United States* v. *Ballard Oil Co. of Hartford*, 195 F. 2d 369 (C.A. 2); *Maier* v. *Publicker Commercial Alcohol Co.*, 62 F. Supp. 161 (E.D. Pa.), affirmed, 154 F. 2d 1020 (C.A. 3). And in the *Standard Oil* case, *supra*, this Court, eschewing "a narrow, cramped reading" (384 U.S. at 226) of the prohibition, which would have restricted it to "substances lacking a pre-discharge value" (384 U.S. at 228), held that "[t]he word 'refuse' includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse" (384 U.S. at 230). And see *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (C.A. 3).

Moreover, the exception in Section 13 for refuse flowing from "sewers" in a "liquid state"—which provides the lone exclusion from the discharge proscription—was, as pointed out by the court below (Pet. App. A, pp. 5a–6a), intended to have limited application. As this Court held in *United States* v. *Republic Steel Corp.*, *supra*, it excepts from criminal

punishment only the dumping into navigable waters of "sewage" (362 U.S. at 490), as that term is customarily used, and does not exempt deposits of "industrial waste" (362 U.S. at 490–491) of the sort involved in the present case.[14]

2. Armed with this broad judicial interpretation of the prohibition in the Refuse Act, recognized by this Court as essential "in light of the purpose to be served" (*United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 491), the United States launched a major enforcement program against industrial polluters in the federal courts in the latter months of 1969 and early 1970, seeking both criminal sanctions and civil injunctive relief under the statute.[15] The program has, thus far, been quite effective. Unrestrained use of our Nation's waterways as a dump-

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[14] The district court instructed the jury that the term "sewage" was defined "as, generally, that water, filth, and feculent matter deriving usually from human and domestic waste, but not including industrial waste" (Pet. App. C, 32a) The jury found that the discharged matter flowing from respondent's pipes was "industrial waste" (*ibid.*). As was the case in *Republic Steel Corp.*, the waste material here contained articles in suspension, although in lesser amounts; but this Court has clearly stated that the existence of such particles in suspension does not permit industrial discharges to be "treated as favorably as sewage is treated" (362 U.S. at 491). The court below found that to be the controlling principle here (Pet. App. A, p. 6a).

[15] In *Republic Steel Corp.*, *supra*, this Court upheld the district court order enjoining further discharges of industrial waste without a permit from the Secretary of the Army, finding the discharges to be in violation of Sections 10 and 13 of the Rivers and Harbors Act (362 U.S. at 485). The federal courts have since uniformly upheld Refuse Act suits by the federal government to enjoin pollution. See Sandler, *The Refuse Act of 1899: Key to Clean Water*, 58 A.B.A.J. 468–469 (1972).

ing ground for industrial waste matter has repeatedly been condemned by the courts as contrary to the spirit and letter of the 1899 Act, and, for the first time, there is evidence of a noticeable reduction in the flood of pollutants being discharged into our rivers, lakes and harbors. See, *e.g.*, *United States* v. *Granite State Packing Company*, C.A. 1, No. 72–1253, decided November 6, 1972 (animal waste); *United States* v. *Genoa Cooperative Creamery Co.*, 336 F. Supp. 539 (W. D. Wisc.), appeal docketed, C.A. 7 (creamery wastes); *United States* v. *United States Steel Corp.*, 3 E.R.C. 1057 (N.D. Ill.) (steel-mill waste); *United States* v. *Hercules, Inc.*, 335 F. Supp. 102 (D. Kan.) (ammonia); *United States* v. *Armco Steel Corp.*, 333 F. Supp. 1073 (S.D. Tex.) (cyanide, phenols and ammonia); *United States* v. *Maplewood Poultry Co.*, 327 F. Supp. 686 (D. Me.) (blood and chicken remains); *United States* v. *United States Steel Corp.*, 328 F. Supp. 354 (N.D. Ind.), appeal pending, C.A. 7, No. 72–1590 (red sediment and oil); *United States* v. *Florida Power & Light Co.*, 311 F. Supp. 1391 (S.D. Fla.) (heated water); *United States* v. *Interlake Steel Corp.*, 297 F. Supp. 912 (N.D. Ill.) (suspended solids).[16]

The contentions of those accused of pollution, seeking to narrow the scope of the Refuse Act prohibition, or, alternatively, to expand the statutory exception

[16] Of the 403 criminal prosecutions that have been decided, 327 (81 percent) have been successful. There are 115 criminal cases still pending. Fifty-three (92 percent) of the 58 completed civil suits have been decided in the government's favor, resulting in decrees requiring the immediate or phased abatement of the discharge. Seventy civil cases are still pending.

for "sewage," have generally been unsuccessful."[17] Similarly, the courts have rejected the contention that the flat ban in the 1899 Act against discharging refuse matter can no longer be enforced in light of the congressional command to establish water quality standards in the subsequently amended FWPCA."[18]

The principal weakness in the latter argument is that Congress specifically provided in the 1965 and 1970 legislation that the new statutes are not to be construed as "affecting or impairing" the prohibition in the Refuse Act."[19] See *United States* v. *Interlake Steel Corp., supra,* 297 F. Supp. at 917; *United States* v. *Maplewood Poultry Company, supra,* 327 F. Supp. at 688. This savings clause is entirely consistent with the announced purpose of the FWPCA "to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution" (33 U.S.C. (1970 ed.) 1151(a)).

As this Court emphasized in *Republic Steel Corp.* and *Standard Oil,* that, too, is an objective of the Re-

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[17] As stated *supra*, p. 5, these contentions were also rejected by the court of appeals in the present case. See also *United States* v. *City of Asbury Park*, 3 E.R.C. 1417 (D. N.J).

[18] The provisions with respect to water quality standards were first added in the Water Quality Act of 1965, 33 U.S.C. (1964 ed, Supp. IV) 466g; they were retained, with some revisions, when the FWPCA was again amended in 1970 by the Water Quality Improvement Act, 33 U.S.C. (1970 ed.) 1160(c)(1).

[19] See Section 11 of the Water Pollution Control Act of 1948, 62 Stat. 1161, as amended in 1956, 70 Stat. 507, as further amended by the Water Quality Act of 1965, 79 Stat. 903, and as further amended by the Water Quality Improvement Act of 1970, 84 Stat. 113; 33 U.S.C. (1970 ed.) 1174.

fuse Act; it was, in the words of the court below (Pet. App. A, p. 8a), "designed to accomplish what may be viewed as the same end by different means." Congress has plainly made the considered judgment that, to clear up the Nation's waterways, it is not enough to require, as it did by the 1965 and 1970 amendments to the FWPCA, that the separate States establish "water quality criteria" for their "interstate" waters (33 U.S.C. (1970 ed.) 1160(c)(1)) which are subject to civil enforcement measures only (33 U.S.C. (1970 ed.) 1160). Such a program provides only a partial response to the ecology problem (and see pp. 13–14, *supra*). For example, as one commentator has astutely observed (Steffin, *supra*, 22 Hastings L.J. at 785; footnotes omitted):

> The only standards provided for are ambient standards which set maximum pollutant concentrations in receiving bodies of water. Consequently, there are no restrictions on the pollutants released in the individual polluter's effluent stream. This omission permits multiple polluters to continue discharging effluents while the cumulative effect of their discharges reduces the quality of the receiving body of water below the standards set by the act.[20]

Accordingly, Congress also saved unimpaired the broad prohibition in the Refuse Act (33 U.S.C. 1174), thereby preserving a complementary enforcement procedure of

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[20] The comprehensive Water Pollution Control Act Amendments of 1972 (*supra*, n. 7) effectively eliminate this deficiency of the earlier statutes by providing for quality standards for industrial and municipal effluents (Secs. 306 and 307, 86 Stat. 854 and 858), and by establishing a comprehensive permit program (Secs. 401 and 402, 86 Stat. 877 and 880).

greater impact (criminal and civil penalties) and wider application (all navigable waters).[21]

3. This legislative judgment notwithstanding, in the present case a federal court has—for the first time in more than 70 years—held, in essence, that the 1899 statute is unenforceable against anyone who discharged pollutants prior to December 31, 1970 (see n. 5, *supra*). Relying on the proviso clause giving the Secretary of the Army broad discretion to permit certain discharges if they do not impede navigation, the court below adopted a novel construction of the Refuse Act which would cast serious doubt on all prior convictions thereunder and foreclose continued prosecution of the cases now pending.[22] It is our submission that this decision rests on precisely the sort of "narrow, cramped reading" of the statute which this Court has insisted the legislative purpose "forbids" (*United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 491; *United States* v. *Standard Oil Co.*, *supra*, 384 U.S. at 226).

B. THE SECRETARY'S PERMIT AUTHORITY

1. The court of appeals based its departure here from all previous judicial interpretations of Section

[21] For a more complete discussion of the shortcomings of the FWPCA, prior to its most recent amendment in 1972, and an analysis of the interrelationship between that Act and the Refuse Act, see Note, *The Refuse Act: Its Role Within the Scheme of the Federal Water Quality Legislation*, 46 N.Y.U. L. Rev. 304, 319–323 (1971).

[22] In view of the statutory permit program to be implemented under the 1972 amendments to FWPCA (Secs. 401 and 402, 86 Stat. 877 and 880), the decision below would not affect actions under the Refuse Act that might be initiated in the future. See n. 7, *supra*.

13 on the statutory language contained in the second proviso to the general prohibition, which reads in relevant part (33 U.S.C. 407): "That the Secretary of the Army * * * may permit the deposit [of refuse matter deemed not to be injurious to navigation] * * * within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material * * *." The court assumed that Congress intended by this proviso that "a regulatory program" (Pet. App. A, p. 15a), administered by the Secretary, would be established, and that the criminal penalties in the statute would apply only to "those who failed to comply with this regulatory program" (*ibid.*). In the absence of such a program, the court thus concluded—and it is agreed that the Secretary had adopted no formalized permit procedures under the Refuse Act for some 70 years (but see n. 5, *supra*)—the discharging of pollutants into navigable waters was never intended to be a crime.

The court thus engrafted upon the Act a novel interpretation under which the proviso would swallow up—and effectively nullify—the basic statutory prohibition. In so doing, it made no reference to the fact that in the proviso Congress used the words "may permit" in authorizing the Secretary to exempt particular river deposits from the prohibition of the Act. Also ignored was the condition in the proviso that the Secretary need exercise his discretion only with respect to applications "made to him prior to depositing such material."

Unquestionably the language chosen by Congress

would not *preclude* the establishment of a formal permit program, and there is much to be said for encouraging the administrative agency to follow such a course." But it is not the function of the judiciary to rewrite legislation in a manner which it might deem to be more desirable or effective." In 1899, Congress chose to place in the discretion of the Secretary of the Army, in those instances where a prior application is made, the determination whether to immunize from criminal prosecution discharges that would otherwise be unlawful. See *United States* v. *United States Steel Corp.*, 328 F. Supp. 354, 360 (N.D. Ind.), appeal pending, C.A. 7, No. 72–1590; *United States* v. *United States Steel Corp.*, 3 E.R.C. 1057 (N.D. Ill.). Nothing is said in the statute about the manner in which that authority is to be exercised. The language used is permissive, not mandatory; in contrast to other portions of the Rivers and Harbors Act enacted contemporaneously, the proviso involved here does not in terms call for a formal regulatory scheme to make the broad anti-dumping provision operative."

" One of the major difficulties in combating water pollution has been in identifying the polluters and locating where the pollutants are being discharged into the water. See Barry, *supra*, 68 Mich. L. Rev. at 1121–1122. It was in part to meet this problem that a formal permit program to regulate the discharge of refuse matter was devised in December 1970 (see n. 5, *supra*).

" As we have pointed out, Congress has now enacted legislation providing for a comprehensive permit program (see nn. 7 and 20, *supra*).

" Compare Section 11 of the Rivers and Harbors Act of 1899, 33 U.S.C. 404, which instructs the Secretary of the Army to establish harbor lines beyond which works may not be extended or deposits made "except under such regulations as may be prescribed from time to time by him." And see Section 4 of

Nor is there any support in the legislative history for the court of appeals' assumption that Congress intended so to condition enforcement of the Refuse Act. While that history contains no specific reference to the Section 13 permit proviso, it does make clear, as we earlier indicated (*supra*, p. 15), that the broad prohibition in the 1899 statute was a codification of earlier criminal statutes, including the Act of 1890 (26 Stat. 453) and the Act of 1894 (28 Stat. 363). See *United States* v. *Standard Oil Co.*, *supra*, 384 U.S. at 226–229. Neither of these predecessor statutes contemplated that application of their operative provisions would turn on the existence of a "regulatory program." On the contrary, the 1890 Act provided only that its absolute ban on the discharge of enumerated substances could not be construed "to prevent" (26 Stat. 454) the Secretary of War from granting, in his discretion, a permit to deposit such material into navigable waters; the 1894 Act contained no permit authorization whatsoever.[26] And as this Court indicated in *Standard Oil Co.*, the prohibition in the Refuse Act was not intended to have a narrower reach than that of the statutes it was designed to codify with "no essential changes in the existing law" (32 Cong. Rec. 2923).

The court below thus had no warrant for rewriting

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the Rivers and Harbors Act of 1905, 33 Stat. 1147, 33 U.S.C. 419, authorizing regulations regarding the transportation and dumping of dredging material.

[26] The predecessor Acts of 1886 (24 Stat. 329) and 1888 (25 Stat. 209), pertaining only to New York Harbor, which served as models for the above Acts, were virtually identical in form and substance.

the 1899 statute to condition the enforcement of its discharge prohibition on the establishment of a formal "regulatory program." By engaging in such judicial legislation, it has in effect stood the statute on its head. What Congress intended generally to proscribe—*i.e.*, the discharge of industrial pollutants (see *United States* v. *Standard Oil Co., supra,* 384 U.S. at 229–230)—becomes generally permissible. The proviso's *limited* defense to a Refuse Act prosecution for discharges which the Secretary in his discretion "may permit," is expanded by the court of appeals into virtually an absolute defense in the absence of a regulatory program which Congress did not prescribe.[27] No longer would it be enough for the Secretary, consistent with past practice (see pp. 27–33, *infra*), to exercise his "permit" authority informally upon submission of a discharge application; he must, under the opinion below (Pet. App. A, pp. 14a–15a), devise a formal "regulatory program" as a precondition to any prosecutions for the illegal discharge of pollutants. Such a judicial reformulation of a legislative

[27] The court of appeals apparently believed that, in light of *Standard Oil*, discharges of an "accidental nature" can be prosecuted under the Act even in the absence of a formal permit program (Pet. App. A, p. 9a). It has long been recognized that the Refuse Act draws no distinction between discharges which are accidental and those which are intentional. See, *e.g.*, *Scow No. 36, supra; The President Coolidge*, 101 F. 2d 638 (C.A. 9); *United States* v. *Interlake Steel Corp., supra.* Under the Third Circuit's view of the statute, however, the intentional polluters would, in the absence of a regulatory program, go free, while those who accidentally discharge refuse matter into navigable waters could be criminally prosecuted. There is no reason to believe that is the result Congress wished to achieve.

proviso—a reformulation which essentially removes from the reach of the criminal statute the very activity it was designed to prohibit—is not warranted by any recognized principle of statutory construction. See *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 236–237.[28]

There is, moreover, no cause to give the Refuse Act such a "narrow, cramped reading" (362 U.S. at 491) because of later enactments by Congress in the water quality field. Contrary to the opinion below (Pet. App. A, p. 10a), the legislative directives in the Water Quality Act of 1965 and the Water Quality Improvement Act of 1970 that each State establish clean water standards as a means of controlling industrial pollution (see pp. 19–20, *supra*) are not "fundamentally inconsistent" with the 1899 statutory ban on almost all pollutant discharges. See, *e.g.*, *United States* v. *Interlake Steel Corp.*, *supra*, 297 F. Supp. at 916–917; *United States* v. *United States Steel Corp.*, *supra*, 328 F. Supp. at 357; *United States* v. *Maplewood Poultry Co.*, *supra*, 327 F. Supp. at 688. We have

[28] Neither *Brown* v. *State*, 167 S.W. 348 (Tex. Ct. App.), nor *Mitchell* v. *Dixon*, 168 S.W. 2d 654 (Tex. Com. App.), on which the court of appeals relies, supports its reading of the statute. Those decisions hold that where a licensing statute or ordinance requires the establishment of a board to review license applications to carry on specified activity, and no such board has been established, an individual cannot be convicted for engaging in that activity without a license. By contrast, the Refuse Act, a criminal statute, designates the Secretary of the Army as the official to issue permits in his discretion; there is no requirement that a separate board of review be established; nor is the Secretary required to do more than act on permit applications that are submitted to him.

pointed out that the earlier legislation explicitly authorizes the Secretary of the Army to act on individual discharge applications submitted to him. In exercising his discretion in this area, he has been instructed by Congress not to grant any permit if the proposed discharge fails to meet the minimum quality standards under the amendments to the FWPCA (33 U.S.C. 1970 ed.) 1171(b)(1))." This limitation on the Secretary's *permit* power, however, in no way undermines the general *prohibition*. Rather, consistently with the purpose of both the Refuse Act and the FWPCA (*supra*, p. 19), Congress has prescribed stricter controls over all discharges of refuse that may, in the Secretary's discretion, be excused from the 1899 proscription, so that foreign effluents having an impermissibly high waste content will no longer be deposited into our Nation's navigable waters.

2. We do not deny that the water quality restrictions placed by Congress in 1970 on issuance of federal permits affecting navigable waters were prompted in part by the fact that the issuing authorities had in the past, like many others, given too little attention to environmental considerations. As pointed out by the court of appeals (Pet. App. A, pp. 12a–13a), until the public recently focused on the ecological crises at hand, the Corps of Engineers had exercised its responsibility in

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" Under the 1972 Act, the authority conferred on the Secretary of the Army under the Refuse Act to permit certain discharges has been rescinded (Sec. 402(a)(5)(86 Stat. 880). The Environmental Protection Agency has the responsibility under the new legislation to administer the permit program (see n. 7 and 20, *supra*).

this area "*principally* against the discharge of those materials that [were] obstructive or injurious to navigation" (33 C.F.R. (1967 ed.) 209.395; emphasis added). This is not to say that the Corps viewed the matter of "pollution control" as outside its jurisdiction; its 1946 regulations, for example, clearly recognized that this also was an area of its responsibility under the Refuse Act (33 C.F.R. (1946 ed.) 209.50(d)). But for many years the chemical and biological content of discharged effluents was generally not regarded as particularly significant.

As a result, the Corps has, belatedly, been accused of having been in the past "but sporadically faithful in screening issuance of section 13 [Refuse Act] permits to industrial polluters." Rogers, *supra*, 119 U. Pa. L. Rev. at 768. It is true that in only a handful of cases has a Section 13 permit accompanied an authorization under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403) to discharge industrial waste.[30] And the Section 13 permit has apparently been used

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[30] Section 10 prohibits unauthorized "obstruction[s]" to navigation, which could be due to the construction of an outflow structure through which the refuse is deposited into the water, or to the shoaling effect produced by the settling out of suspended solids contained in the discharged effluent. See *United States* v. *Republic Steel Corp.*, *supra*. In a list compiled by the Corps of Engineers in 1970 of outstanding permits issued since 1899 for the discharge of industrial waste, only five Section 13 permits appear. See *Hearings before the Subcommittee on Energy, Natural Resources, and the Environment of the Senate Committee on Commerce on the Effects of Mercury on Man and the Environment*, 91st Cong., 2d Sess., pp. 137, 168, 201 (July 1970) (hereafter "*Senate Environment Hearings of 1970*"). We are advised that one of these (Camden, Alabama) was actually a Section 10 permit.

almost as sparingly in connection with authorized dumpings of dredgings and other refuse materials under Section 4 of the Rivers and Harbors Act of 1905 (33 U.S.C. 419).[31]

The fact that the Corps of Engineers did not focus on matters of pollution as much as on effects to navigation is perhaps due in part to some confusion over the reach of the 1899 statute prior to this Court's decisions in *Republic Steel* and *Standard Oil*.[32] Whatever the explanation, it is clear that the agency began to assume a very different attitude with respect to the significance of environmental considerations shortly thereafter. As the Assistant General Counsel of the Corps testified in the *Senate Environment Hearings of 1970* (p. 26), special attention to the control of industrial pollution became evident, "as a matter of evolution, from 1966 on * * *." This was first manifested in a 1967 memorandum of understanding entered into by the Secretaries of the Army and Interior with respect to implementation of the Fish and

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[31] This was reflected in the 1968 regulations, 33 C.F.R. 209.200(e)(2), which stated in relevant part:

"(2) Section 13 of the River and Harbor Act of March 3, 1899 * * * authorizes the Secretary of the Army to permit the deposit of refuse matter in navigable waters, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, within limits to be defined and under conditions to be prescribed by him. *Although the Department has exercised this authority from time to time*, it is considered preferable to act under Section 4 of the River and Harbor Act of March 3, 1905 * * *. [Emphasis added.]"

[32] Indeed, some members of this Court believed the statute should be read more narrowly. See the dissenting opinions in *Republic Steel* (362 U.S. at 493) and *Standard Oil* (384 U.S. at 230).

Wildlife Coordination Act, 16 U.S.C. (1964 ed.) 662(a), which authorized the Corps to issue dredge and fill permits under Section 10 of the Rivers and Harbors Act. Speaking to the Corps' responsibilities under both Section 10 *and Section 13*, the memorandum stated that permits were not to be issued by the Secretary of the Army unless he could "assure compliance with water quality standards established in accordance with law" (33 C.F.R. 209.120(d)(11)). In 1968, the Corps completely revised its general permit policy; with respect to the issuance of all pemits affecting navigable waters, the new regulations announced that the agency would evaluate "all relevant factors, including the effect of the proposed work on navigation, fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest" (33 C.F.R. 209.120(d)(1)). At the same time, the regulation that had provided that the availability of discharge permits under the Refuse Act would depend "principally" on whether the materials "are obstructive or injurious to navigation" (33 C.F.R. (1967 ed.) 209.395) was withdrawn.

To be sure, it was not until December 1970—four months after samples were taken of the discharges involved here—that a formal permit program was set up under the Refuse Act (Exec. Order 11574).[33] But we dis-

[33] Prior to the sampling of PICCO's discharges into the Monongahela River on August 7 and 19, 1970, the Corps of Engineers had announced "sweeping changes in its regulations pertaining to permits for work in navigable waterways" (U.S. Army Corps of Engineers News Release, Washington, D.C. (May 19, 1970)), and had further advised that "new permits" under Section 13 would be required "where existing permits were

agree with the court of appeals that, until the institution of those formalized procedures, the Corps of Engineers "decline[d] to undertake the responsibility imposed upon it by Congress" (Pet. App. A, p. 15a). Congress plainly did not make the Secretary of the Army "responsible for administering [a] regulatory program under Section 13 * * *" (Pet. App. A, p. 14a). Rather, as we have shown, in prohibiting all discharges of refuse matter into navigable waters except "sewage," it simply left room for the Secretary to exercise his discretion to excuse from the general prohibition any person who applied to him in advance for permission to deposit the forbidden effluents.

The fact that few persons sought such permission (App. 173, 174) does not alter the terms of the statute. Congress imposed no obligation on the Secretary to solicit applications. Most probably, if on his own, he had undertaken earlier to do so, considerably fewer polluters would have been able to flout the 1899 law. But his inactivity in this regard neither repealed, nor provided those polluters an exemption from, the general prohibition. The Refuse Act imposes upon *them* the obligation to make prior application for a permit; and it

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granted without adequate consideration of the quality of the effluent" (U.S. Army Corps of Engineers News Release, Washington, D.C. (July 30, 1970)). The latter announcement also stated that "[w]hile permits will be required for all future discharges into navigable waters and their tributaries," the principal concentration would initially be "on major sources of industrial pollution not covered by existing permits." Copies of these news releases are appended *infra*. See also Rodgers, *supra*, 119 U. Pa. L. Rev. at 811 (discussing similar news releases issued out of the Corps of Engineers' Seattle, Wash., office). We are advised that the May 1970 news release was also issued contemporaneously out of the Corps' Pittsburgh office.

condemns as criminal any discharge of refuse matter, other than "sewage", that is made without a permit.

3. The court of appeals suggests, however, that PICCO cannot be faulted for having failed to seek a federal discharge permit, since such an application would have been merely to engage in "a charade * * * for something which did not exist" (Pet. App. A, p. 16a). This reasoning rests on a misconception that seems to run throughout the opinion, *viz.*: that because there was no formal "regulatory program," Section 13 discharge permits were "unavailable" (*ibid.*). That was not the case. As acknowledged by the court below (*id.* at 14a), there was (and is) no administrative policy "to deny permits on a blanket basis to all seeking to discharge industrial refuse having no adverse effect on navigation." We have pointed out that, even in the earlier years when the concern of the Corps of Engineers was "principally" directed to matters of navigation, the Secretary exercised his permit authority under the Refuse Act on several occasions (*supra*, p. 27–29). And see *United States* v. *Republic Steel Corp.*, 286 F. 2d 875, 879 (C.A. 7), on remand from 362 U.S. 482. What is even more to the point, however, is that he was clearly prepared to take such discretionary action in appropriate circumstances with respect to applications submitted to him in 1970. That was the thrust of the testimony by the Assistant General Counsel of the Corps of Engineers during the *Senate Environment Hearings* in May of that year (pp. 28–29).[34]

[34] See also the General Counsel's testimony. *Senate Environment Hearings of 1970*, pp. 430–431.

Public announcements by the Corps in May and July indicated the same thing (*supra*, n. 33). And in November 1970, before a "regulatory program" had gone into effect, the Secretary accepted and agreed to consider applications for Section 13 permits to discharge effluents containing mercury. 1 *Environment Reporter, Current Developments*, pp. 782–783 (1970).

It is thus clear that if PICCO had submitted an application to discharge refuse matter from its iron and concrete pipes protruding into the Monongahela River, the Secretary would have given its application due consideration. It should, of course, be assumed, as was pointed out on remand from this Court's decision in *United States* v. *Republic Steel Corp., supra*, 286 F.2d at 879, that the "government officials who bear the responsibility [would] not [have] act[ed] arbitrarily or capriciously * * *." "

II

PICCO'S CONDUCT CANNOT BE JUSTIFIED ON THE GROUND THAT IT HAD BEEN AFFIRMATIVELY MISLED BY THE CORPS OF ENGINEERS TO BELIEVE IT DID NOT NEED A PERMIT FOR THESE DISCHARGES

The court of appeals divided over whether PICCO's August 1970 industrial discharges at issue here could be justified on the ground that the company had been "misled by the interpretation given to the statute by the Corps of Engineers" (Pet. App. A, p. 19a). The claim is essentially that because certain published regulations of the Corps pertaining to Section 13 focused primarily on discharges that impede navigation, PICCO had been led to believe that the permit requirement under the 1899 statute did not apply to the depositing of non-impeding pollutants into the river. The regulations on which the company relies, however, are outdated, and do not reflect the Corps' understanding of the Refuse Act prohibition after 1968. In view of the post-1968 regulations issued by the Corps, and the clear pronouncements of this Court in *Republic Steel* and *Standard Oil*, PICCO cannot, we submit, avail itself of the defense that it was "affirmatively misled * * * into believing that a permit was not necessary in its situation" (Pet. App. A, p. 25a).

A. The regulatory provisions offered by PICCO to support its due process claim antedate the clear change by the Corps of Engineers in its policy with respect to water pollution control, which we have discussed *supra*, pp. 27–33. While those earlier regulations

neither were, nor purported to be, authoritative interpretations of the scope of Section 13 (compare *Ruley* v. *Ohio*, 360 U.S. 423), they do represent what the Corps then conceived as its enforcement authority under the Refuse Act. We cannot deny that in defining its responsibilities under the 1899 statute as "directed * * * principally against the discharge of those materials that are obstructive or injurious to navigation" (33 C.F.R. (1967 ed.) 209.395), the agency for many years viewed its role narrowly. But PICCO is in no position to excuse its conduct because of these earlier pronouncements.

In 1968, the regulation quoted above, on which PICCO places principal reliance, was withdrawn. In its stead, the Corps issued a new general permit policy, announcing that "pollution" and "conservation" factors would be considered in passing on applications for permission to use navigable waters, 33 C.F.R. 209.120(d)(1).[25] This new policy had been fore-

[25] See p. 30 *supra*. While the majority below suggests that subsection 209.200(e)(2) of the new regulations can be read as limiting the Section 13 permit authority to discharges that impede navigation, such a reading takes that regulatory provision wholly out of context. The subsection cited is part of Section 209.200(e), entitled "Dumping grounds," which is concerned with the problem of transporting and dumping refuse in designated areas within navigable waters. In subsection (2), the Corps, recognizing that Section 13 permits might be sought in connection with the dumping of dredgings and other refuse matter, served notice that in such circumstances it would "act under Section 4 of the River and Harbor Act." This subsection was retained in 1971 when the Corps promulgated its regulations implementing the Refuse Act Permit Program (33 C.F.R. 209.131).

shadowed almost a year earlier in a memorandum between the Secretaries of the Army and Interior outlining their responsibilities under the Fish and Wildlife Coordination Act (16 U.S.C. (1964 ed.) 662(a)). That memorandum, which was incorporated into the Corps' regulations, stated clearly that environmental considerations, including "compliance with water quality standards," would bear directly on the determination whether to issue permits under Section 10 and Section 13 of the Rivers and Harbors Act. See 33 C.F.R. 209.120(d)(11). Similarly, in its regulations promulgated in December 1968, dealing with its permit authority under 33 U.S.C. 403 (obstructions to navigation), the Corps served notice that applicants for permits for outfall sewers from industrial plants—which is what PICCO has maintained its pipes are (*supra*, p. 5)—would be required to furnish information on the effects of the discharged effluent on the environment. 33 C.F.R. 209.130(b)(18)(iii).

Thus, the Corps' regulations clearly reveal that by 1968 it had abandoned its former policy of considering applications for permission to conduct activity in navigable waters almost entirely from the perspective of the adverse effect that might result to navigation.[36]

Moreover, in determining whether the company's

[36] The plain meaning of the changed regulations was corroborated by the Corps' public announcement in late July of 1970 that Section 13 permits were required in cases such as the present one to avoid the prohibition of the Refuse Act (see n. 33, *supra*).

discharge of its refuse matter into the Monongahela River can properly be attributed to the manner in which the Corps of Engineers construed the statute, consideration should also be given to the proposed regulations to implement the newly-announced Refuse Act Permit Program, first published for public comment in December 1970 (35 Fed. Reg. 20005). These proposed regulations explicitly stated (proposed 209.131(d)(1)):

> Except as otherwise provided in the Refuse Act * * * all discharges or deposits into navigable waters of the United States or tributaries thereof are, in the absence of an appropriate Department of the Army permit, unlawful. The fact that official objection may not have yet been raised with respect to past or continuing discharges or deposits should not be interpreted as authority to discharge or deposit in the absence of an appropriate permit * * *.

This policy was, to be sure, expressed publicly several months after the refuse matter emanating from PICCO's pipes had been sampled by two school teachers on August 7 and 19, 1970 (App. 16–41). But the company was not served with the criminal information in this case until April 6, 1971 (App. 3–4). If, as claimed, its practice of depositing industrial waste into the Monongahela River without seeking a permit had been based on the Corps of Engineers' construction of the Refuse Act, PICCO certainly should have submitted an application for permission to continue

its discharges during the first three months of 1971; however, it did not do so (App. 237)."[37]

In view of the clear pronouncements by the Corps after 1968 that its enforcement policy with respect to the navigable waters of this country included protection against pollution as well as the preservation of safe navigation, there is, we submit, no sound reason to excuse PICCO's delinquency in this regard on the ground that it had been "affirmatively misled" by the agency to believe that its activity was lawful."[38]

[37] The company was advised by letter in November 1970 that its discharges were "unlawful" and required "a permit issued by the Department of the Army under the Refuse Act, 33 U.S.C. 407" (App. 170). An officer of PICCO testified at trial on June 28, 1971, that a discharge application had "been underway since December [1970]" (App. 175), but the company's first request for a Section 13 permit was made on application forms issued in April and May 1971 (App. 232, 237). Nothing in the *proposed* regulations encouraged any delay in filing for a permit. (Compare regulations that became effective after the criminal information was filed in this case, which required that applications be filed no later than July 1, 1971 (33 C.F.R. 209.131(d)(3).) To the contrary, they specifically advised that those who continued to discharge refuse without a permit should not rely on the absence of an "official objection" in the past to "preclude the institution of legal proceedings in appropriate cases for violation of the provisions of the Refuse Act" (35 Fed. Reg. 20005).

[38] PICCO also makes reference to a statement made to its vice-president in 1949 by a member of the Corps of Engineers, which purportedly indicated that at that time no permit would be necessary if the discharges would not impede navigation (App. 176–177). This alleged statement was made, however, during a period when the agency admittedly took a much narrower view of its enforcement responsibilities. Moreover, it preceded by a number of years the decisions of this Court in *Republic Steel* and *Standard Oil*. Indeed, at that time, the industrial plant involved here was not even in operation (App. 184). Thus, the statement, if made, is of little significance to the due process question in this case.

B. This is especially so here, where, as noted by the judge who dissented below on this issue, "the judicial branch of the government has clearly declared the contrary" (Pet. App. A, pp. 26a–27a). As we have pointed out, this Court declared in *Standard Oil* (384 U.S. at 230) that "[t]he word 'refuse' [as used in the Act] includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse." Even before that, the Court held in *Republic Steel, supra*, that day-to-day discharges into navigable waters of industrial waste (which in that case did not differ significantly from the waste matter involved here) violate Section 13 in the absence of a permit from the Secretary of the Army. These rulings were followed by the court below in a previous case. See *United States* v. *Esso Standard Oil Co. of Puerto Rico*, 375 F. 2d 621 (C.A. 3).

Thus the scope of the criminal prohibition had been authoritatively settled well before PICCO made the present illegal discharges into the Monongahela River. The argument that the Refuse Act prohibited only unauthorized discharges causing an impediment to navigation had been unequivocally rejected. We submit that PICCO cannot now avoid this judicial authority by claiming it had been misled into believing the law was otherwise by an administrative enforcement policy that had clearly been abandoned several years before the offenses involved here were committed.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the judgment of conviction should be reinstated.

Respectfully submitted.

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FEBRUARY 1973.

APPENDIX

NEWS RELEASE

DEPARTMENT OF THE ARMY,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, D.C. 20314.

For Public Release: Tuesday, May 19 1970

CORPS OF ENGINEERS REVISES PERMIT REGULATIONS

The Corps of Engineers announced today sweeping changes in its regulations pertaining to permits for work in navigable waterways. These changes, which were approved by Secretary of the Army, Stanley R. Resor, and the Chief of Engineers, Lieutenant General F. J. Clarke, require that greater emphasis be given to environmental values in evaluating permit applications.

The changes include:

A statement that "The decision * * * will be based * * * on an evaluation of the impact of the proposed work on the public interest." "Public interest" is described as including factors such as: "navigation, fish and wildlife, water quality, economics, conservation, aesthetics, recreation, water supply, flood damage prevention, ecosystems and, in general, the needs and welfare of the people." This change clarifies the standard against which permit applications are to be judged and re-emphasizes that the Corps is no longer concerned only with the impact which a proposed project may have on navigation.

A new policy narrowing the function of harbor lines. The new regulations make it clear that harbor lines are merely guidelines for determining, with respect to the impact on navigation interests alone, the offshore limits of construction. Persons wishing to undertake work in navigable waters shoreward of harbor lines are now required to apply to the Corps for work permits. The previous regulations allowed riparian owners to erect open pile structures or to undertake solid fill construction shoreward of established harbor lines without obtaining a permit.

A clarification of the responsibilities of the Corps of Engineers and the Department of the Interior with respect to off-coast oil drilling operations. The new regulations note that the Department of the Interior is responsible for considering the impact which such operations may have on the total environment at the time of the selection of submerged lands of the Outer Continental Shelf for inclusion in the mineral leasing program administered by the Department of the Interior but provide for consideration by the Corps of the "impact of the proposed work on navigation and national security."

Revised regulations on the issuance of public notices and the holding of public hearings on permit applications. Except in cases involving minor work where it is clear that the proposed work would have no significant impact on environmental values, notices containing information on the proposed work are to be posted in post offices or other public places and sent to a broadly defined list of affected interests. "Doubtful cases will be resolved

in favor of public notice and normal processing." Interested parties are to be given a "reasonable time," defined as not less than 30 days except in emergency cases, to express their views. Public hearings are to be held whenever there is a manifestation of public interest in a permit application or whenever requested by Federal, State, or local public authorities.

A requirement that applicants not only define the areas they want to fill, but describe the type and location of structures proposed to be erected on the fill. Previously, applicants were not required to provide information concerning subsequent use of filled tracts.

A requirement that applicants whose proposals involve outfall works must provide details on the character of the effluent, including chemical content, water temperature differentials, toxins, sewage, type and quantity of suspended solids, amount and frequency of discharge, and the like; along with the proposed method of instrumentation, and arrangements for bearing the expense of removal of solids. Before taking action on any such permit applications, the Corps' District Engineers are required to consult with regional directors of the Department of the Interior and with Federal and State agencies having water pollution abatement responsibilities.

New permit forms for implementing the regulation changes have been furnished Corps of Engineers field offices. Among other things, these forms stipulate that observance of regulations of the Federal Water Quality Administration and State water-pollution control agencies made a condition of the permit, and permittees must make every reasonable effort to carry out approved work

in a manner that will minimize any adverse impact on fish, wildlife, and natural environmental values.

A special condition in permits authorizing the filling in of navigable waters restricts permittees from erecting buildings or structures not contemplated at the time of issuance of the permit or from significantly changing the outward appearance of approved structures or the use to which the filled tract is dedicated without first obtaining a permit modification.

A special condition in permits for outfalls restrains permittees from changing the nature of their effluent without a permit modification. Such permittees are also required to maintain adequate records of the nature and frequency of discharges and to provide discharge information to the District Engineer upon request.

[News Release]

DEPARTMENT OF THE ARMY,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, D.C. 20314.

For Immediate Release, July 30, 1970

CORPS OF ENGINEERS ANNOUNCES NEW PERMIT REQUIREMENTS

The Corps' revised requirements are in compliance requirements under the Refuse Act (33 U.S.C. 407) concerning all discharges into navigable waters. Permits will be required for all industrial discharges into navigable waters and their tributaries. New permits will be required where existing permits were granted without adequate consideration of the quality of the effluent. Permits will also be required for current discharges into navigable waters where no permits have been granted.

Applicants for new permits are now required to identify the character of the effluent and to furnish pertinent data such as chemical content, water temperature differentials, toxins, sewage, quantity of solids involved and the amount and frequency of discharge.

The Corps of Engineers today announced new permit with the Environmental Policy Act of 1969 which requires agencies to consider environmental impact in the administration of public laws, and with the Water Quality Improvement Act of 1970 which requires appli-

cants for Federal permits to file a certification from the appropriate State that the discharge "will not violate applicable water quality standards." Under the revised procedures, the effects of discharges on water quality will be considered in processing the permit.

While permits will be required for all future discharges into navigable waters and their tributaries, the Corps of Engineers will initially concentrate on major sources of industrial pollution not covered by existing permits. The Corps hopes that through widespread knowledge of its new permit requirements including State certification, it will, along with other Federal, State, and local anti-pollution activities, encourage industries to accelerate their own anti-pollution efforts.

All actions under the Refuse Act having Water Quality implications are being closely coordinated with the Federal Water Quality Administration to insure unity in the Federal Water anti-pollution program.

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